WHY DO SO FEW EMPLOYEES GET THEIR JOBS BACK? A CRITIQUE OF THE REMEDY OF REINSTATEMENT IN THE UNFAIR DISMISSAL SYSTEMS OF AUSTRALIAN AND BRITAIN

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The Evolution and Development of Unfair Dismissal Law in Britain and Australia

Why Do So Few Employees Get Their Jobs Back? A Critique of the Remedy of Reinstatement in the Unfair Dismissal Systems of Australian and Britain

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Part I: Introduction

Albeit at different times, a statutory unfair dismissal system in Britain[2] and Australia[3] was ushered in as part of a promise for a new beginning for domestic labour law. Britain's *Industrial Relations Act* of 1971 was a fruit of fierce debate in the preceding decade over the future of British labour law and an attempt by the Conservative Government to replace strife with orderly industrial relations. For Australia, the legislative desire of the *Industrial Relations Act* of 1993 was not order but modernisation: to re-order industrial relations so that enterprise bargaining and not the traditional processes of conciliation and arbitration became the central determinant of wages and conditions. As part of both countries' departure from their traditional path, a statutory unfair dismissal system was canvassed and ultimately introduced as an enhancement of legal protection to working people so as to guarantee a greater degree of universal job security that was not contingent upon their ability to garner union support for their dismissal claim against their employer. The notion of job security conceived by each system tended to focus upon providing compensation for unfair dismissal: in both Britain and Australia it was the exception rather than the rule that an unfairly dismissed worker would get their job back. Providing a 'cost' to employers for unfair dismissal was intended to bring about the cultural reform of workplaces so that dismissals occurred according to the correct procedure and resulted in fairer outcomes. The idea was to incentivise employers to only dismiss a worker with good reason and according to the dictates of natural justice. This paper explores whether the failure of either system to significantly accord reinstatement or re-employment to unfairly dismissed workers is of concern and undermines the ability of Britain and Australia's unfair dismissal laws to protect workers' job security.

Part II: The Treatment of Reinstatement in Legislation and Case Law

In Britain and Australia there is a disjuncture between the legislative provision that reinstatement is the primary remedy for unfair dismissal and the practical reality that in neither jurisdiction is it awarded to any significant degree. In Australia the

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[2] The author recognises that 'Britain' is a legally imprecise term. It is used in this thesis to refer to the common framework of unfair dismissal law that was created for England, Wales and Scotland in 1971.

[3] Whilst a statutory unfair dismissal system was created earlier in some Australian States, the focus of this thesis is on the introduction and evolution of a nationwide federal unfair dismissal system. A description of the state unfair dismissal systems that existed prior to the inception of the federal law can be found in Chapter 2.

preference for reinstatement over compensation has been present in the architectural foundation of Australia's federal unfair dismissal system since its inception in 1993 although its status has ebbed and flowed over time. Section 170EE of the *Industrial Relations Act* 1993 (Cth) indicated plainly that 'it was Parliament's intention that the primary remedy for unlawful termination should be reinstatement and that compensation should be available only where this was impracticable'.[4] However, in the *Workplace Relations Act* 1996 (Cth) this was amended so that reinstatement was the 'primary' remedy under the Act, only in the sense that reinstatement must be considered *first.* There was no overriding presumption in favour of reinstatement under section 170CH.[5] This was changed in 2009 under the *Fair Work Act* 2009 (Cth) with the insertion of section 390(1) providing reinstatement as the presumptive remedy when dismissal has been deemed to be unfair. The intention of legislators that an unfairly dismissed applicant should be able to return to their job is also evident from the Explanatory Memorandum to the Act[6] and the objects of the unfair dismissal provisions contained in section 380(1)(c) which requires that the system provide remedies for an unfair dismissal with 'an emphasis on reinstatement'. Whilst in Britain, legislators initially favoured the remedy of compensation following the advice of the Donovan Commission,[7] this policy was changed by the *Employment Protection Act* 1975 (UK) which expressly provided that reinstatement was to be the primary remedy. To encourage more orders of reinstatement, the legislation was amended again in 1978 to make it clear that if the employee wishes to be reinstated the tribunal must make an order to this effect, unless it is satisfied by the employer that is impracticable for him to comply with an order, or that it would not be just to make an order because the employee caused or contributed to his own dismissal'.[8] This legislative preference for reinstatement has continued to the present day encapsulated in section 116 of the *Employment Rights* Act 1996 (UK). However, this preference operates on a more qualified basis than in Australia as 'it is necessary nevertheless to appreciate the form in what that intention or presumption is enacted. It consists simply in providing that those remedies be considered first'.[9]

Yet, despite the intentions of legislators, in both jurisdictions reinstatement is very much the exception and has always been so. In Britain as far back as 1973, only 4.2% of those whose cases were settled through conciliation received their jobs back

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[4] *Liddell v Lembke* (1994) 127 ALR 342, 360 (Wilcox CJ and Keely J).

[5] *Newtronics Pty Ltd v Salenga*, Print R4305, 29 April 1999, Polites SDP, Acton DP, Smith C, at 6, affirming the decision of the Full Bench in *Australia Meat Holdings v McLaughlan* (1998) 84 IR 1.

[6] para 1555-6.

[7] Britain's unfair dismissal law was introduced in the *Industrial Relations Act* 1971; the Donovan Commission was the colloquial name given to the Royal Commission on Employers and Trade Unions which conducted a significant study into British industrial relations in the late 1960s. One of the questions they considered was whether Britain should introduce a statutory unfair dismissal system. For their final report see: Report of the Royal Commission on Trade Unions and Employers' Associations (Cmnd 3888,1969). For a comprehensive history of British unfair dismissal law see, Paul Davies and Mark Freedland, *Labour Legislation and Public Policy* (Clarendon Press, 1993); see also: Simon Deakin and Gillian Morris, *Labour Law*, (5th edn, Hart, 2009).

[8] These provisions were introduced in the Employment Protection (Consolidation) Act 1978, ss 68-71.

[9] *Oasis Community Learning v* Wolff (2013) UKEAT/0364/12/MC at [10].

and by 1979 this had fallen to 1.8%.[10] Of those who went to a tribunal hearing, 2.3% were recommended to be given their job back in 1973 but by 1979 only 0.8% received reinstatement orders.[11] Freedland and Davies noted that the commitment to reinstatement by Labour during its term in government between 1974 and 1979 was limited at best, 'the crucial point, however, is that the 1970 Bill, 1971 Act and 1975 reforms all protected the freedom of the employer to buy its way out of an award of reinstatement upon payment of a relatively modest additional lump sum'.[12] The marginalization of reinstatement as a remedy has continued: whilst there were over 40,000 unfair dismissal claims before the Tribunal in 2010-11, only eight cases concluded with orders from the Tribunal reinstating the claimant; the result was similar in 2011-2012 with 5 awards of reinstatement out of 46,100 unfair dismissal applications made to the tribunal.[13] A similar trajectory has been followed in Australia. Of the 774 applications disposed of by arbitration in 1997-1998, seventeen resulted in an order for reinstatement and 403 resulted in compensation orders.[14] More recently, between 2011-2012 only seventeen reinstatement orders and 85 compensation orders were made out of 525 unfair dismissal applications which proceeded to arbitration.[15] Of the 81% of claims that were settled at the conciliation stage in 2011-2012, 1.4% received reinstatement, 59% received compensation and 20.6% received a non-monetary benefit, with the remaining 19% receiving no outcome from the conciliation.[16] That not every applicant seeks reinstatement is an important qualification upon the preceding statistics. Given that in neither jurisdiction statistics are compiled on the intentions of applicants it is impossible to properly evaluate whether the few orders of reinstatement in either jurisdiction is attributable to the applicant's lack of interest in this remedy or because of an unwillingness of the Commission or the Tribunal to award it.

The case law from both jurisdictions sheds some light as to why reinstatement is so infrequently awarded. Even assuming that not many employees request reinstatement, when they do, employer opposition is to be anticipated given that the employer is likely to want to stand by its original decision to dismiss the worker. The employer's assertion that there is no longer the necessary trust and confidence in the worker to maintain the employment relationship is a powerful persuasive factor constraining the award of reinstatement. The discussion below indicates how in Australia both the more favourable legislative set-up and the Commission itself is more willing than in Britain to look behind the employer's argument to see whether the employment relationship can be repaired if an order of reinstatement is made. The cases discussed below reveal how the Australian and British courts approach reinstatement in practice.

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[10] Bob Hepple, 'Individual Labour Law' in GS Bain (ed) *Industrial Relations in Britain* (Blackwell, 1983) 409.

[11] ibid.

[12] Paul Davies and Mark Freedland (n 11) 210.

[13] Ministry of Justice, *Employment Tribunals and EAT Statistics*, 2011-12, 1 April 2011 to 31 March 2012.

[14] Annual Report of the President of the Australian Industrial Relations Commission and Annual Report of the Australian Industrial Registry 1 July 1997 to 30 June 1998, Table 9.

[15] Annual Report of Fair Work Australia, 1 July 2010-30 June 2011, p 29.

[16] Annual Report of Fair Work Australia, 1 July 2011-30 June 2012, p 92.

(i) Australia

Reinstatement rarely occurs in Australia but when it has, judicial treatment of the remedy has recognised the importance of placing the employee back into an employment situation no less favourable than the one he or she previously enjoyed. In *Blackadder v Ramsey Butchering Services Pty Ltd* the High Court found it to be a violation of a meat worker's reinstatement order when he was asked to sit a medical examination before returning to work as when the worker declined to do this the employer deemed him unable to return to his particular job boning meat. In this case, the Justice McHugh said:

> To reinstate means to put back in place. In this context, it means that the employment situation as it existed immediately before the termination must be restored. It requires restoration of the terms and conditions of the employment in the broadest sense of those terms. It empowers the Commission to do more than restore the contract of employment. So far as practicable, the employee is to be given back his "job" at the same place and with the same duties, remuneration and working conditions as existed before the termination.

In a recent case applying *Blackadder,* the Fair Work Commission ordered the reinstatement in the face of significant employer opposition of a worker for whom there was no valid reason for his dismissal.[17] In this situation the employer had actually tendered evidence to the Commission to suggest that even if the worker was reinstated he would not be allowed entry onto the construction site that he had previously worked on. The Commission was critical of the employer's position and the reinstatement order made it clear that reinstatement means 'the same place, duties, remuneration and conditions of employment'.[18]

Although in this case the Commission was willing to order reinstatement in spite of employer opposition when there was no valid reason for dismissal, it is unclear whether this would not have occurred if the dismissal had been unfair because it was harsh, unjust or unreasonable. What is undeniable is that reinstatement does not get awarded often in Australia. Perhaps a reason for this is that the imposition of the 'fair go all round' concept to the working out of remedies means that the employee's right to work is counterbalanced against the employer's right to determine their staff. Of relevance to the Commission's determination of whether reinstatement is a suitable remedy is the concept of 'a fair go all round' being accorded to both the employer and employee in working out remedies.[19] The Commission has emphasised, however, that 'the *fair go* object does not constitute a basis for ignoring, or for rolling into one amorphous act of judgment, the procedures or conditions associated with the powers and discretions to determine remedies'.[20] The Commission specifically referred to the requirement for a 'fair go all round' in *Brooks v Australian Dried Fruit Sales Pty Ltd.*[21] The Commission found that the termination of two employees on the

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[17] *John Daziel v Bilfinger Berger Services (Australia) Pty Ltd* [2010] FWA 1129

[18] *Daziel* at [53].

[19] Fair Work Act 2009 (Cth), section 381.

[20] *Sprigg v Paul's Licensed Festival Supermarket* (1998) 88 IR 21, 31.

[21] (1998) 84 IR 33, 50.

grounds of redundancy was harsh, unjust or unreasonable. Only one was reinstated. In deciding that reinstatement was not appropriate for the other employee, Commissioner Simmonds took into account the low score that the employee had achieved on a competency test, which was 17% below the lowest person retained by the company during the redundancy process. He considered that in these circumstances 'there are insufficient grounds for me to conclude that reinstatement is appropriate as it would not provide the company with a "fair go all round"'.[22]

This application of the 'fair go all round' principle in taking into account the employer's interest in justifying a decision not to award reinstatement is perhaps at odds with the traditional idea of a 'fair go all round' which recognised the employee as the 'underdog'. In the entry on the 'Fair go' in 'The Oxford Companion to Australian History', there is reference to the 1964 writings of influential Australian public intellectual and journalist David Horne that '"Fair-goes", are not only for oneself, but for underdogs' and a recognition that the concept might be used to justify assistance for less gifted students or pensions for the old.[23] The term is identified as originating from the British expression 'a fair show' and to give a person a 'fair go' was to give them a reasonable opportunity or to ensure that the rules of competition were fair to all. In his seminal work Hancock identified it as 'the popular refrain of Australian democracy, repeated incessantly in pleas and judicial decisions, in statutes, Parliamentary debates, trade union conferences and platform orations'.[24] The term was introduced into the specific context of Australian arbitration and conciliation by Justice Higgins who sought to identify what was 'fair and reasonable' in determining wages and conditions.[25] This notion of the employee as the 'underdog' is relevant to the development of unfair dismissal law as it has led to recognition that the employee needs to be protected from arbitrary dismissal and that part of according the employee 'a fair go' in dismissal is accepting that the employee is in a vulnerable, perhaps even disadvantaged, position during the dismissal process. The origin of the arbitral principle of 'a fair go' in the unfair dismissals context is Justice Sheldon's decision in *Re Loty and Holloway v Australian Workers' Union* (1971) AR 95. This principle has traditionally allowed the tribunal to scrutinise the dismissal decision in order to counter-balance the employer's managerial prerogative and assess whether the decision to fire was unjust given the subordinate status of the employee. Reflecting on the period after the Second World War, Justice Kirby noted that the federal tribunal's role as 'the guardian of industrial equity and the ultimate enforcer of the Australian nation's commitment to a fair go in industrial relations' seemed indisputable.[26] Nonetheless, after 1996 the Coalition Government imposed the AIRC's longstanding arbitral principle of a 'fair go all round' into the jurisdiction of unfair dismissal and has subverted the original idea by introducing the notion of an employer-as-underdog. In determining whether a dismissal is harsh, unjust or unreasonable, section 170CA(2) contained an express statement of legislative purpose as being to provide a system to

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[22] ibid 51.

[23] Graeme Davison, 'Fair go' in Graeme Davison, John Hirst and Stuart Macintrye (eds), *The Oxford Companion to Australian History* (OUP, 2001).

[24] William Hancock, *Australia* (Ernest Benn, London 1930).

[25] Keith Hancock and Sue Richardson, 'Economic and Social Effects' in Joe Isaac and Stuart Macintrye (eds) *The New Province for Law and Order* (CUP, 2004) 146-147.

[26] Michael Kirby, 'Human Rights and Industrial Relations' [2002] JIR 562, 563.

ensure a 'fair go all around' to the employer and the employee. The use of this specific phrase in the Act arose out of significant debate over the predecessor Act which did not include this phrase. In the Second Reading debates over the 1995 amendments, the Minister for Workplace Relations Mr Reith referred to the judgment of Justice Gray of the IRC and stated:

> They (Labor's unfair dismissal laws) proved to be totally biased against employers. Honourable members do not have to accept my view of that. Justice Gray, in one of the very many court cases we have had on these provisions, said, "The former South Australian and the present State Act, like their counterpart in New South Wales, operate in the realm of the 'fair go all round'...This is not a realm that this Court inhabits. The provisions of division 3 of part VIA of the federal Act are not directed to achieving some balance between the interests of employers and employees in particular cases. They constitute a charter of rights for employees. They are directed towards the protection of the existing jobs of employees.[27]

Whilst traditionally a reason *for* the award of reinstatement, the 'fair go' principle has evolved into allowing a justification *against* the award of this remedy because of the employer's need to have trust and confidence in their staff.

A recent case of two unfairly dismissed workers provides an interesting study of the Commission's approach to ordering remedies as despite both workers wishing to return to their jobs only one received reinstatement. In this case, the business, Boom Logistics, dismissed two employees after a workplace investigation determined that misconduct and bullying had resulted in a toxic workplace culture. Both Mr Bell, a crane operator, and Mr Mackay, a trainee dogman, were summarily dismissed because of the business's belief that they were involved in a bullying incident occurring after the conclusion of the investigation. The Commission found both employees had been unfairly dismissed by Boom, as their alleged conduct did not constitute a valid reason for the dismissals. There was not enough evidence to substantiate the allegations, and some of the conduct occurred out of hours. It was further established that neither Bell nor Mackay had been provided with notice, or a reasonable opportunity to respond to the reasons for dismissal. Boom Logistics was very much opposed to reinstatement, arguing that the trust and confidence between the workers and the employer had been completely lost.[28] In determining the remedy, the Commisison first observed the discretionary nature of its power, 'While the Act does not explicitly so provide, it is clear from the statutory scheme, including the use of the term "inappropriate", that an order for reinstatement is a discretionary decision of the Tribunal.'[29] The Commission then considered the decision of the Full Court in

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[27] Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 30 August 1995 (Mr Peter Reith, Minister for Workplace Relations).

[28] *Boom* at [53].

[29] *Bell and another v Boom Logistics Limited* [2013] FWC 81 at 89; In *Coal and Allied v AIRC* Gleeson CJ, Gaudron and Hayne JJ stated at [46], '"Discretion" is a notion that "signifies a number of different legal concepts". In general terms, it refers to a decision-making process in which "no one [consideration] and no combination of [considerations] is necessarily determinative of the result." Rather, the decision-maker is allowed some latitude as to the choice of the decision to be made. The latitude may be considerable as, for example, where the relevant considerations are confined only by

Perkins v Grace Worldwide (Australia) Pty Ltd where an earlier decision not to award reinstatement was overturned because of a belief in the capacity of the employment relationship renewal despite the employer's view (albeit erroneous) that the worker had been involved in misconduct. In this oft-cited case, the Full Court stated:

> In most cases, the employment relationship is capable of withstanding some friction and doubts. Trust and confidence are concepts of degree. It is rare for any human being to have total trust in another. What is important in the employment relationship is that there be sufficient trust to make the relationship viable and productive. Whether that standard is reached in any particular case must depend upon the circumstances of the particular case. And in assessing that question, it is appropriate to consider the rationality of any attitude taken by a party. It may be difficult or embarrassing for an employer to be required to re-employ a person the employer believed to have been guilty of wrongdoing. The requirement may cause inconvenience to the employer. But if there is such a requirement, it will be because the employee's employment was earlier terminated without a valid reason or without extending procedural fairness to the employee. The problems will be of the employer's own making. If the employer is of even average fair-mindedness, they are likely to prove short-lived. Problems such as this do not necessarily indicate such a loss of confidence as to make the restoration of the employment relationship impracticable.[30]

In the present case, the Commission deemed it inappropriate to reinstate Mr Bell and awarded him compensation, but chose to order reinstatement for Mr Mackay. In relation to the former employee, the Commission considered the business's genuine loss of confidence and trust in Mr Bell because they considered him to be aggressive, difficult and potentially a harmful presence in the workplace. The Commission noted that Mr Bell expressed no willingness to change his behavior or to deal effectively with managers who had grave concerns about his presence in the workplace. In contrast, the Commission noted that Mr Mackay was a much younger worker who was less likely to be embedded in the toxic work culture as he was only a trainee; he had never had any prior disciplinary warnings, he showed remorse for his conduct and demonstrated an appropriate attitude necessary for the employment relationship to be productive and viable. This case reveals the Commission's willingness to critique the employer's assertion that the employment relationship has irrevocably broken down in light of the worker's attitude and past performance.[31]

(ii) Britain

The preference for the remedy of reinstatement is expressed in more qualified terms in British legislation and awarded even less frequently than in Australia. In terms of the legislative set-up, section 112 requires the Tribunal to explain to the complainant of their right to an order for reinstatement once a finding has been made that the

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the subject-matter and object of the legislation which confers the discretion. On the other hand, it may be quite narrow where, for example, the decision-maker is required to make a particular decision if he or she forms a particular opinion or value judgment.'

[30] *Perkins* at [48].

[31] An appeal by Boom Logistics to stay Mr Mackay's reinstatement order was unsuccessful: *Boom Logistics Limited v Bell; Mackay* [2013] FWC 1017.

unfair dismissal application was well-founded. According to the EAT, 'compliance with section 112 is a valuable discipline for the purpose of ensuring that important issues relating to reinstatement and re-engagement are not overlooked'.[32] Section 113 empowers the Tribunal to award either reinstatement or re-engagement and section 116 provides guidance about the discretion whether to order either of these remedies with particular emphasis placed on the practicality of returning a complainant to their employer and consideration of whether the employee's conduct contributed to his or her dismissal. Two early British authorities provide guidance on the correct approach to the question of practicality of reinstatement, namely *Coleman v Magnet Joinery Limited*[33] and *Meridian Ltd v Gomersall*[34]. In *Coleman* the Court of Appeal emphasised that 'practicable' meant not just 'possible' but 'capable of being carried into effect with success'[35] and that reinstatement would not be practicable in that sense if it would lead to the reinstated employee's colleagues taking industrial action. In *Meridian* the Employment Appeals Tribunal enjoined 'a broad commonsense view of what was practicable'. Practicality of reinstatement is determined at the date it is to take effect and not at the date of dismissal or the date of the unfair dismissal application.[36]

This question of practicality was considered more recently in a case concerning a teacher dismissed because of a substantial number of allegations of misconduct against him. He in turn made a number of serious allegations of misconduct on the part of other employees of the school authority. The teacher sought the remedy of re-employment with the same school authority largely because of a desire not to have an unexplained gap on his curriculum vitae. Upon making a finding of unfair dismissal, the Tribunal turned to the question of which remedy was appropriate to award and made the following observations:

> Whilst as we have indicated, very few successful claimants nowadays seek re-employment orders, the relevant legislation, setting out the primary remedies of reinstatement/re-engagement is now some forty years old. It has not been substantially amended during that period. It remains the intention of Parliament that a successful claimant should be reinstated or re-engaged if he so wishes. The only relevant circumstance in which that will not occur is if it is not practicable….It seems to us that [both sides asserting substantial allegations of misconduct] is not an uncommon situation in unfair dismissal claims involving professional people. It is notoriously the case that complex allegations and counter-allegations are made in such cases and Tribunals frequently spend weeks, rather than days, in analyzing and deciding the contention of those parties. (para 25)
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> We consider that if we were to accept [the employer's] argument that re-employment is not practicable, the more bitter the dispute between the parties and the more serious the allegations and counter-allegations that had been made, that approach would have the effect of emasculating the remedy of re-employment. We do not regard that as the intention of Parliament. (para 27)

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[32] *King v Royal Bank of Canada Europe* Ltd (2011) UKEAT.0333.10.DM, para 55, p 17.

[33] [1975] ICR 46

[34] [1977] ICR 597

[35] Stephenson LJ at p 52 B-C.

[36] *Great Ormond Street Hospital v Miss Patel* UKEAT/0095/07/LA at para 27(1); *Rembiszewski v Atkins Ltd* (2012) UKEAT/0402/11/ZT at para 39.

In making an order for re-engagement the Tribunal identified the bitterness of the dispute between the parties as the primary barrier in terms of practicality. To rectify this the Tribunal took the step of including in its order a clause which it had asked the complainant to initially draft, which stated that he would treat all disputes as resolved and that he would comply with the employer's procedures relating to disciplinary and grievance matters, whistleblowing policies and reasonable management direction pertaining to his employment.[37] The Tribunal's decision to award the remedy of re-employment by requiring that the teacher be posted to a different school overseen by the school authority was appealed by the latter on the basis that the original decision overstated the primacy of reinstatement as a remedy for unfair dismissal and that the Tribunal erred in its finding that re-employment was practicable given the severity of the allegations made by the parties. The EAT rejected the appellant's case, stating that 'the Tribunal's mood music was rather more favourable to re-engagement than that is generally heard; but that cannot amount to an error of law'.[38] The EAT was satisfied that the Tribunal had addressed the difficulties raised by the school authority in re-engaging the school teacher and had made a considered judgment on the facts. They noted the willingness of the teacher to make a fresh start and that the re-hiring would be at a different school with 'a wholly new set of colleagues not no history to live down'.[39] Finally in its conclusion, the EAT noted 'no general conclusions about the readiness which reinstatement or re-engagement orders should be drawn from our decision, except perhaps that every case depends on its facts'.[40]

We can see from this recent case the substantial hurdles an applicant has in making an argument for reinstatement. In the present case the teacher was advantaged by the fact the school authority had a different school in which he could be placed, however most applicants would not have this argument available to them. Furthermore, the Tribunal in this case was willing to take a rather interventionist role in mending the relationship between the parties by including in the order a stipulation that the teacher, whilst recognising him to be a strong-minded 'man of principle', be cognizant of his responsibility to obey the employer's reasonable directions going forward. As the EAT noted, not all Tribunals would be so inclined to award the remedy of reinstatement in circumstances such as these given the bitterness of the dispute and the existence of allegations of misconduct by both parties. Furthermore, given the time-consuming nature of pursuing an unfair dismissal application and the increasing incidence of the parties making 'complex allegations and counter-allegations' as identified in the original decision, it seems like reinstatement is an unlikely outcome of a British unfair dismissal dispute.

Part III: A historical contrast: there was a time when reinstatement was more frequently awarded

It was not always so that reinstatement was such a marginalised remedy. In previous incarnations of the United Kingdom and Australia's labour laws unfairly dismissed workers were more likely to return to their jobs. In both jurisdictions the state relied

[37] School teacher case, para 25, p 16.

[38] School teacher case, para 33, p 20.

[39] School teacher case, para 36, p 21.

[40] School teacher case, para 44, p 24.

upon collective organization to protect workers' interests and unions had a pivotal role in securing the protection of job security. Reinstatement was more regularly achieved despite the fact that in neither traditional system did an individual worker have a statutory right to unfair dismissal. The following section explores Britain's system of 'collective laissez-faire'[41] prior to the enactment of the *Industrial Relations Act* 1971 (UK) and the traditional New South Wales[42] model for dealing with unfair dismissals.

(i) Australia

Traditionally, New South Wales mandated the resolution of unfair dismissal disputes through union monopoly. Unlike in other jurisdictions where provision was made for individually initiated dismissal disputes, in NSW unions retained their right to act as the gatekeeper to the conciliation and arbitration system for every industrial dispute, including disputes relating to individuals. An individual employee was not able to initiate proceedings without the support of a union, or alternatively, a group of aggrieved fellow workers because the unfair dismissal application had to be signed by the union secretary or the employer.[43] The rationale for union monopoly was that the best way to guarantee industrial peace was through unions vetting unfair dismissal applications and only pursuing those of merit. It also was a way of ensuring that only dismissals that could give rise to industrial disruption were dealt with by the NSW conciliation and arbitration mechanism. This had the practical effect, however, that if an individual had a legitimate unfair dismissal claim but was unable to secure union support because pursuing the individual's claim did not complement the union's broader agenda or undermined their relationship with the employer, then that individual had no opportunity for redress. In contrast, dismissal of a union official was much more likely to receive adjudication by the conciliation and arbitration system as such a claim would naturally attract union support.[44] The remedy awarded by the NSWIRC depended more upon maintaining industrial peace than achieving justice for the individual concerned. As Stewart observes, 'the likelihood of a remedy being secured is often directly related to the industrial muscle of the relevant union and to its willingness to act as an enforcer of any order made'.[45] This is because the primary task of the NSWIRC was to settle disputes in order to promote industrial harmony and the application of this task, usually aimed at collective disputes, to individual dismissal disputes, meant that remedies could be awarded on the basis of averting sympathy strikes rather than whether the dismissal breached defined

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[41] Otto Kahn-Freund coined the term 'collective laissez-faire' to describe the British system of industrial relations prior to 1971 . Recently, Alan Bogg revisited the question of the usefulness of this theory in aiding understanding of British labour law and assessed the validity of the main critiques of collective laissez-faire which have emerged, namely the absentionist, neutrality and coherence critiques. He concluded that each of these critiques is somewhat misplaced and that 'collective laissez-faire still offers the most compelling theoretical rationalisation of the pattern of auxiliary intervention in the post-war period': Alan Bogg, *The Democratic Aspects of Trade Union Recognition* (Hart, 2009) 3.

[42] New South Wales is a state within the Australian federation.

[43] *Roberts v Mona Vale District Hospital* [1975] 2 NSWLR 132, 138 (Court of Appeal); Industrial Arbitration Act 1940 (NSW) s 74.

[44] Andrew Stewart, 'Employment Protection in Australia' [1989] CLL 27.

[45] ibid.

standards of employer behaviour. Despite the obvious criticisms that can be made against the NSW system because of union monopoly, Stewart does note that the emphasis on industrial peace led to the elevation of conciliation as the primary method for resolving dismissal disputes and resulted in the resolution of the vast majority of disputes at this stage and through the remedy of reinstatement.[46]

The governing objective of the NSW unfair dismissal system was to deliver to workers a 'fair go' or 'industrial fair play' in the context of unfair dismissal disputes. The first judgment to concretely assess the matrix of factors impacting upon whether a dismissal was fair was the judgment of Justice McKeon in *Western Suburbs District Ambulance Committee v Tipping.*[47] While this was a dissenting opinion, the statement of principles contained within the judgment has been widely regarded as authoritative.[48] Justice McKeon characterised the employer's right to dismiss as clear and fundamental and placed the burden on the individual employee to prove the unfairness of the dismissal. He suggested that in deciding whether to order reinstatement, the question the court should ask is whether there has been oppression, injustice or unfair dealing on the part of the employer. This discussion of justice in dismissal is extended by the significant decision of the NSW Industrial Relations Commission in *Loty & Holloway v Australian Workers Union*[49] which concerned an application for reinstatement of two employees dismissed from their positions in a union after a change in the composition of the union executive. In determining whether to make awards providing for their reinstatement, Justice Sheldon asked whether the employees had 'received less than a fair deal'.[50] Justice Sheldon also referred to the objective of the unfair dismissal jurisdiction as being to provide 'industrial justice' by reference to a number of factors including the inviolability of the right of the employer to manage his business, the nature and quality of the work in question, the circumstances surrounding the dismissal and the likely practical outcome if an order of reinstatement is made. Justice Sheldon affirmed an earlier statement of a Commissioner that the purpose of the exploration into the individual's dismissal by the NSWIRC is to ascertain whether there has been a 'fair go all round'.[51]

(ii) Britain

The British system of 'collective laissez-faire' was characterized by a reliance on the collective organisation and as such, industrial action was used as the primary tool to deal with unfair dismissals. The mobilization of the workers as a collective tended to be effective in achieving a speedy return of the dismissed individual to their job. In Britain the Whitley Committee's First Interim Report in 1917 recommended 'the establishment for each industry of an organisation representative of employers and workpeople, to have as its object the regular consideration of matters affecting the

[46] Stewart (n 44) 27-28.

[47] *Western Suburbs District Ambulance Committee v Tipping* (1957) NSW AR 273.

[48] See *North West County Council v Dunn* (1970) CLR 247 [263] (Walsh J); see also *In Re Coccia and Australian Iron and Steel Pty Ltd* (1971) NSW A.R. 111 [115] per Sheldon J.

[49] [1971] AR (NSW) 95.

[50] ibid 99.

[51] [1971] AR (NSW) 95 [99].

progress and well-being of the trade from the point of view of all those engaged in it'.[52] According to Clay, this amounted to a 'public and official recognition of trade unionism and collective bargaining as the basis of industrial relations'.[53] In this way, voluntarism prioritised the achievement of union security over other industrial relations goals because it was believed that collective bargaining would lead to the orderly resolution of industrial conflict and thereby bring about industrial peace.[54] Unions preferred to use industrial tactics rather than the law to secure the return of an unfairly dismissed employee to their job. In 1961 the Trades Union Congress[55] questioned officials of its affiliated unions on their attitude towards the introduction of legislation providing protection against unfair dismissal. The majority of respondents, from 44 out of 57 unions, said they preferred the matter to be dealt with through collective bargaining.[56] This view was of course in keeping with the voluntarist tradition whereby it is thought that workers can best achieve their goals by relying on their own organisation. The traditional strategy employed by unions to protect individual employees facing a dismissal which they deemed to be unreasonable was to threaten the employer with industrial action in order to secure the individual's reinstatement. From the union's perspective, this situation was mainly satisfactory as they could use their industrial leverage to enable an unfairly dismissed employee to get their job back. This was an industrial tactic unions were not afraid to use. Unofficial dismissal-related strikes were a well-known phenomenon of British collective laissez-faire, for example, between 1964 and 1966 there were 276 strikes resulting from dismissal.[57] Furthermore, it was not high on the unions' agenda to secure statutory unfair dismissal protection for workers in non-unionised industries, as it was perceived that the first priority for these workers was to achieve unionisation. It was believed that this would then result in greater all-round protection for these workers, including protecting their right to job security by using industrial tactics rather than legal measures. The union's position is aptly summated by the following submission from a union representative to the Donovan Commission[58]:

> I do not think there is any one on the TUC side who would argue against the rights of the worker to be protected equally with the rights of the employer, but we are facing the law as it stands and what we are saying is, do we want the court to protect it or do we want the ordinary industrial machinery to protect it? *The evidence of the TUC has been in favour of the strengthening of the industrial machine*…it is not an argument

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[52] The Whitley Committee, Interim Report on Joint Standing Industrial Councils (Cd. 8606, 1917) para 5.

[53] Henry Clay, *The Problem of Industrial Relations* (Macmillan & Co, 1929) 154 and 177.

[54] For more, see Allan Flanders, 'The Tradition of Voluntarism' (1974) 12 BJIR 352.

[55] The Trade Union Congress (TUC) is the peak body for British trade unions, equivalent to the Australian Council of Trade Unions (ACTU) in Australia.

[56] __ 'Protecting Against Unjustified Dismissal' *The Times* (London 15 March 1965).

[57] Report of the Royal Commission on Trade Unions and Employers' Associations (Cmnd 3888,1969) para 528.

[58] The Donovan Commission was a government-established Royal Commission investigating the question of how to reform British labour law. One of the areas they focused their attention on was the feasibility of introducing a statutory unfair dismissal system in Britain. For more on the Donovan Commission, see : Paul Davies and Mark Freedland, *Labour Legislation and Public Policy* (Clarendon Press, 1993).

> as to whether we think the worker is entitled to the protection, but the method by which the protection is given. (emphasis added) [59]

It was not just unions who were reluctant to lobby for the introduction of statutory unfair dismissal protection but employers too. The principle of industrial autonomy meant it was unlikely that employers would press for any limit on their contractual right to dismiss employees. While the high incidence of dismissal-related strikes was an issue of potential concern to employers, the prevailing attitude amongst employer groups was that a statutory scheme protecting an individual from unfair dismissal would lead to a greater number of contested dismissals as unions acted as a filtering mechanism, weeding out weak complaints as they only resorted to industrial action for dismissals they genuinely disagreed with.[60] When employer groups raised this concern about a statutory scheme with the Donovan Commission, Professor Kahn-Freund of the Commission responded to this argument suggesting the CBI[61] consider the American model where the union decides whether or not to take the unfair dismissal case to the arbitrator as a mechanism for preventing vexatious litigation. However, Mr Taylor of the CBI rejected this approach arguing that under collective laissez-faire the union recognises that to take on an unfair dismissal claim it may ultimately have to call upon industrial action, whereas a union is more likely to support a claim if the union is only responsible for pursuing a case before a tribunal instead of organising a strike.[62] The CBI also argued that the statutory scheme would favour compensation over reinstatement and that the advantage of encouraging voluntary procedures is that they allow for reinstatement which 'goes to the heart of what an unjustly dismissed worker wants'.[63]

Another British employer group strongly advocating the traditional system was the Engineering Employers' Federation (EEF) who believed that its procedure which graduated from informal to formal mechanisms for dealing with unfair dismissal was more flexible and responsive to employee needs than a statutory scheme.[64] In providing evidence before the Donovan Commission, the EEF was extremely critical of a statutory scheme as they thought it unlikely reinstatement would be awarded unlike under its scheme where reinstatement was regularly achieved.[65] In response to the criticism of Professor Kahn-Freund that it would be more just and forward thinking to develop a statutory scheme, the EEF's view was that their system predicated upon the collective laissez-faire notion of industrial autonomy afforded more justice to the worker. Mr Brown stated, 'we believe that the

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[59] Royal Commission on Trade Unions and Employers' Associations, Minutes of Evidence of 29 November 1966 and 31 January 1967 (Her Majesty's Stationery Office, London 1967) para 10402 (Mr Frank Cousins).

[60] Royal Commission on Trade Unions and Employers' Associations, Minutes of Evidence of 23 November 1965 and 7 December 1965) (Her Majesty's Stationery Office, London 1966) para 1529 (Mr Taylor).

[61] CBI' is the Confederation of British Industry, the peak employer group in Britain.

[62] ibid.

[63] Royal Commission on Trade Union and Employer Associations, Minutes of Evidence of 12 December 1967 (Her Majesty's Stationery Office, London 1968) para 11357.

[64] Royal Commission on Trade Unions and Employers' Associations, Minutes of Evidence of 1 February 1966 (Her Majesty's Stationery Office, London, 1967) para 3069.

[65] Donovan (n 57) para 3958.

unions and the employee is much more concerned with getting his job back than with monetary compensation. Our figures show in a surprising number of cases he does in fact get his old job back which shows that we do not favour the employer in dealing with these cases'.[66]

(iii) Conclusion

In both the traditional labour law systems of NSW and Britain there was greater opportunity for workers to receive reinstatement if they were dismissed without cause. However there is an important caveat to this analysis: only unionized workers were able to achieve this as they were able to rely upon the union's support to place industrial pressure on the employer to overturn their dismissal decision. In Britain this issue of unequal access to collective protection was one of the reasons for the introduction of an unfair dismissal scheme according a statutory right to individuals to challenge their employer's dismissal decision.[67] In Australia an individual statutory right not to be unfairly dismissed was developed in the federal labour law system in 1993 which meant that unions no longer acted as the gate-keeper to the bringing of an unfair dismissal claim in NSW. The benefit of achieving reinstatement more frequently under the traditional models has to be counterbalanced against the reliance on union coverage in order to protect job security.

Part IV: Analysis and Questions

1. **Under Britain and Australia's current unfair dismissal systems, even though reinstatement is not awarded often – does it matter?**

2. **Should the legislation in both jurisdictions be amended to reflect that reinstatement is an exceptional remedy in order to convey to applicants the unlikelihood of returning to his or her job?**

3. **Does the failure of the British and Australian systems to achieve reinstatement contrast with the normative ideal of unfair dismissal law in theory by writers such as Meyer, Njoya, Collins and Anderman?**

4. **In Australia is reinstatement more likely to be awarded in adverse action cases? Consider *NTEU v RMIT* [2013] FCA 451:**

In this case the NTEU sought reinstatement, with an alternative claim for compensation, and Justice Gray said his choice was effectively between putting the academic "back into a situation in which, if she should have dealings with [the head of school], those dealings are likely to be unworkable", and forcing the university to

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[66] Donovan (n 57) para 3072.

[67] The majority of the Donovan Commission was of the view that the introduction of a statutory scheme would lead to an immediate raising of standards to a more satisfactory level as employers would seek to comply with the legislative framework governing dismissal procedures. They also argued a statutory scheme would protect workers in non-unionised industries and would greater protect workers in unionised industries, as even in the latter situation, 'employer procedures tend to leave the final decision on dismissal in the hands of management and this cannot be accepted as sufficient to ensure that an employee both has fair treatment and is seen to have it': Report of the Royal Commission on Trade Unions and Employers' Associations (Cmnd 3888,1969) para 542.

"pay out a very large such of money" – estimated at $1.9m, or "significantly in excess of $1m" even discounting for contingencies. The judge said, 'in the circumstances, it seems to me that the first of these courses is the preferable one.' Ordering her reinstatement to the position she held immediately before her dismissal took effect (which was a three-year non-teaching position, negotiated in a dispute settlement process after she lodged her complaints) would return her to a research position in a separate building to the head of school, and where should would be "insulated" from directly reporting to him. She would be 'able to engage in productive research, which would benefit both her and RMIT'. Justice Gray said that at the end of the three-year non-teaching period, it would not be 'outside the range of reasonable management skills to expect that a viable way will be found to ensure that [the academic] is able to return to teaching duties, whilst avoiding contact with [the head of school] so far as possible, to ensure that the School continues to run smoothly.' Justice Gray noted that the professor was paid a "substantial sum" on her redundancy, and because he was ordering reinstatement with recognition of continuity of employment, he didn't propose to also order that RMIT pay any further compensation for reputational damage: 'By the judgment, she will be vindicated. She will suffer no economic harm arising from any damage to reputation.'

5. Does reinstatement get awarded less frequently because of the impact of the common law doctrine of specific performance upon the unfair dismissal system?

In writing specifically about Britain, Kahn-Freund characterised the transplantation of international unfair dismissal laws into Britain's domestic system as one of 'dilution'.[68] He traced the ILO Recommendation 119 as evolving out of the German prototype for resolving unfair dismissals which relied upon an independent arbiter to adjudicate the fairness of dismissals and provide for reinstatement in the case of unfairness. However, Kahn-Freund observed that the application of the German prototype to the British context resulted in the Donovan Commission recommending that compensation be the primary remedy for an employee who had been unfairly dismissed. He attributed this dilution to a 'legal shibboleth' in British law that mandates a contract of employment cannot be specifically enforced against either side. Writing in 1974, Kahn-Freund, who was a key member of the Donovan Commission, appeared to later regret this dilution calling it 'unfortunate' – perhaps an indication that transplanted legal systems can operate very differently depending upon the legal culture and with very different outcomes for the industrial parties.

Another British scholar, Simpson has also observed the failure of Britain's unfair dismissal system to provide for a right to work, arguing that the system reinforced basic managerial prerogative by only attaching a price on arbitrary dismissal.[69] He cautions against overestimating the impact of the unfair dismissal system on improving dismissal standards given the 'retrogressive impact' of the common law origins for many of the terms in the statutory system.[70] He notes that

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[68] O Kahn-Freund, 'On Uses and Misuses of Comparative Law', *The Modern Law Review*, 1974, 37(1).

[69] Bob Simpson, 'British Labour Relations in the 1980s: Learning to Live with the Law' (1986) 49 MLR 796, 804-805.

[70] Simpson (n 69) 804.

statutory unfair dismissal protection only benefits workers who are 'employees', with 'contracts of employment', who are 'dismissed' and concludes that:

> Perhaps more fundamental is the extent to which the traditions of common law thinking have influenced and molded the shape of much of the new statutory regime. As long as this remains, the potential for creating effective change in labour relations through employment protection legislation remains limited if not illusory.[71]

In another important piece, Hepple argues that British unfair dismissal law could more effectively achieve 'a right to work' if the system included 'a general right for trade unions at the workplace to be consulted about any type of dismissal and not, as at present, only collective redundancies, and it would aim to encourage the development of systems of independent internal appeals against disciplinary decisions. A strategy for maintaining continuity of employment would include measures to widen the groups whom the law covers, and would make re-employment a more attractive alternative, for example, by the statutory continuation of contracts of employment until disputes about dismissal are resolved by negotiation or, failing this, by decision of an industrial tribunal'.[72]

[71] Simpson (n 69) 806.

[72] Bob Hepple, 'A Right to Work?' (1981) 10 ILJ 65 at 92.